No. 12914

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

ANSWER BRIEF OF APPELLEE

Appeal from the District Court of the United States for the District of Oregon.

HON. GUS SOLOMON, *Judge.*

HARRY GEORGE, JR.,
EMERSON U. SIMS,
600 Henry Building,
Portland 4, Oregon,
WILLIAM A. BABCOCK,
Public Service Building,
Portland 4, Oregon,
Attorneys for Cross-appellant and Appellee.

JAMES ARTHUR POWERS,
1935 S. W. 12th Ave.,
Portland 1, Oregon,
NORMAN N. GRIFFITH,
602 Pacific Building,
Portland 4, Oregon,
For Appellant and Cross-appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8–51

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES (Cont.)

STATUTES

MISCELLANEOUS

No. 12914

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*
vs.
KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*
vs.
C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

ANSWER BRIEF OF APPELLEE

Appeal from the District Court of the United States for the District of Oregon.

HON. GUS SOLOMON, *Judge.*

A Statement of Facts has been heretofore filed in Cross-Appellee's Brief and will not be repeated here.

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR NOS. I TO X

This Court has held in *Williams v. Dodd,* 163 Fed. (2d) 724, that points argued by appellant but not stated in the Statement of Points need not be considered by the Appellate Court. A comparison of "Appellant's Statement of Points upon which Appellant will Rely on Appeal" (T. 83), with Appellant's Brief, Subject Index, Specifications of Error Nos. I to X, shows that there is almost no similarity between the two. Where an extremely liberal view might suggest that in some items the substance is the same, a closer reading shows a material variance. Appellant's Brief appears to contain matters not found in the Statement of Points.

Appellee finds that, because of inconsistencies, omissions and contradictions appearing in Appellant's Brief, a point by point answer would not aid in resolving the matters in issue.

To illustrate, in Appellant's Brief, Specifications of Error No. I, appellant complains that the Court did not require the employment status of the decedent to be found as a prerequisite to applying the Employers' Liability Act. Yet, in its No. I of "Points upon which Appellant will Rely on Appeal", it complains that its motion for a directed verdict should have been granted because decedent left the safe place provided for doing his work and, contrary to law, entered a place of danger.

In its Brief, Specification No. II, appellant complains of refusing to give a charge that the action could not be

maintained if decedent was found to be an independent contractor. Point No. II of its "Points upon which Appellant will Rely" claims error for failing to require the jury to determine the status of deceased's employment.

In Specification No. III, Appellant's Brief, the appellant complains because the Court refused to admit a ruling of the Industrial Accident Commission as to the employment status. Examination of the documents quoted by appellant in its brief on page 19 shows a rejection of the claim because deceased was not employed subject to the provisions of the Act. This might have been because his employer had rejected the Act or that the employee was a relative of the employer, or because he was a farm worker or any one of a myriad of reasons, but not by any stretch of the imagination could it be used to establish the fact that deceased was the person that had the direction and control over the unloading work and was therefore not protected by the Employer's Liability Act. In addition, under the provisions of Section 102-1729, O.C.L.A., the document was clearly inadmissible. At best the document was hearsay. The State Industrial Accident Commission is not a body that is authorized to determine the facts in a case, as is the Washington Commission. In Washington, the Commission is a fact-finding body, and its decisions may be upset only on a failure of evidence to support the findings. In Oregon, the Commission is purely an administrative body that makes its investigation in the absence of the claimant, and the claimant's first opportunity to have his day in Court and the right to examine and cross-examine witnesses and rebut evidence appear when the case is tried de novo in the

Circuit Court. Therefore, the general rule that administrative decisions are admissible in evidence is not applicable to reports or orders of the Oregon State Industrial Accident Commission, as they are res judicada as to nothing as concerns the rights of the claimant. See *Tice v. State Industrial Accident Commission,* 183 Or. 593.

In Specification of Error No. IV, appellant complains because the Court did not instruct that violation of the Logging Safety Code was negligence per se. Yet, in Specification No. V, it complains because the Court did not withdraw all of the specifications of negligence from the complaint because they were specifications of violation of the Logging Safety Code.

Under its Specification No. VI of its Brief, appellant proposes the novel doctrine that where decedent leaves a safe place and enters an unsafe place, in violation of the Logging Safety Code, it exonerates the employer. It has long been settled that, under the Employers' Liability Act, the person having charge of or responsible for any work involving risk or danger to its employees or the public is charged with a higher degree than ordinary care. *Stanfield v. Fletcher,* 114 Or. 531. The duties imposed are non-delegable, absolute and continuing and the doctrine of assumption of risk by an employee does not apply to actions for injuries under the Act. *Dorn v. Clarke-Woodard Drug Co.,* 65 Or. 516. Further, it is the duty of the person having charge of and control of the work to see that there is no unsafe place to work. *Suey v. Benson Hotel,* 91 Or. 395. Also, *Shields v. W. R. Grace and Co.,* 91 Or. 187. It is further interesting to note that appellant predicates its argument on the fact

that decedent was an employee, apparently for the moment abandoning its contentions that he was an independent contractor.

In Specification of Error No. X of the Brief, appellant complains that the Court failed to instruct that, if there was no intermingling with employees of defendant, the Act would have no application. The only evidence relative to this matter showed that the truck driver, the unloading engineer, the boom boss and the pond man worked as a team together to accomplish the unloading work, the work being directed by the boom boss and the unloading engineer. The work of each was so closely integrated and interdependent that there could be no occasion for giving the requested instruction. Taken as a whole, appellant's brief poses only one question which, if answered, resolves all other points.

ARGUMENT

Members of the public are protected by the Employer's Liability Act when on the premises of an owner or person having charge of, or responsible for, work involving a risk or danger:

(1) *When the member of the public is there with the authority of the owner; and*

(2) *When the member of the public is engaged in work there in furtherance of a common enterprise with said owner; or*

(3) *When the member of the public is there by virtue of a contractual relationship which requires that the orbit or scope of his employment be*

about the machinery or work of said owner in the accomplishment of a common purpose in which the owner has an interest.

The evidence and the pleadings show that, at the time of the fatal accident, the appellee's decedent, Dean Hutchens, was employed by W. R. Francis, a small logging contractor, to haul logs for Francis with his log truck. That Francis was performing a contract with appellant C. D. Johnson Lumber Corporation to fall, yard and haul appellant Johnson Corporation's timber, of which decedent's work was a part. That in delivering said logs of appellant Johnson Corporation, the deceased was required to deliver them to the unloading dump of the appellant Johnson Corporation. That the unloading dump was owned and operated under the direction and control of appellant Johnson Corporation, its unloading engineer and log dump boss. The unloading operations required that the truck driver had to work with team-play cooperation with the unloading crew to dump the load under the direction and control of the unloading crew and intermingling with them. That at the time of the fatal accident, Dean Hutchens had arrived at the log dump and was taking off his binder chains under the direction of the appellant to prepare his load for dumping, when the appellant's crane engineer dumped the log, crushing him to death.

The Court, during the course of the trial, held "the only question is whether or not they were engaged in a common enterprise and whether or not plaintiff's decedent was on the premises lawfully and as long as that is shown I think the Act will apply."

In support of appellee's position, the following points and authorities are submitted:

(1) The Employers' Liability Act of the State of Oregon provides protection to all employees and certain members of the public engaged in work involving a risk or danger.

The "and generally" clause of the Act with which we are here concerned reads as follows:

> " * * * and generally, all owners, contractors or sub-contractors *and other persons having charge of,* or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and protection which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices." (Emphasis added)

The requirements of the law are extended by the latter part of this section to all persons having charge of or responsible for any work involving risk or danger to employees or persons having a lawful or contractual right to be on the property. *Dunn v. Orchard Land Co.,* 68 Or. 97; *Marks v. Bauers,* 3 Fed. (2d) 516; *Fitzgerald v. Oregon-Washington R.R. & Nav. Co.,* 141 Or. 1.

(2) It is well established by a line of decisions of the Oregon State Supreme Court that the protection of the Act is not confined to only "employees" of the person having charge or responsible for the work. It places a duty on employers to other persons, not their employees, so that where the duties of such other persons bring them

within reach of dangers, they must be protected by the person having charge of the danger.

Clayton v. Enterprise Electric Co., 82 Or. 149;

Cauldwell v. Bingham and Shelley Company, 84 Or. 257 (1917);

Rorvik v. North Pacific Lumber Co., 99 Or. 58 (1921);

Walters v. Dock Commission, 126 Or. 487 (1928);

Coomer v. Supple Investment Co., 128 Or. 224;

McKay v. Pacific Building Materials Co., 156 Or. 578;

Pacific States Lumber Co. v. Barger, 10 Fed. (2d) 235.

(3) Protection of the Act also extends to other persons or members of the public not strictly speaking the employees of the owner or person in charge of the work or of another employer, provided that the person seeking the protection of the Act is on the premises with the authority of the owner and is engaged in work there in furtherance of a common enterprise or by virtue of some contractual relationship which exposes him to risk or danger.

In *Clayton v. Enterprise Electric Co.,* 82 Or. 149, the defendant was engaged in furnishing electricity to a pumping plant, and an employee of the owner of the pumping plant was killed as a result of defendant's failure to properly guard and cover the electric wiring and connections. The employee was engaged in work for his employer at the plant at the time he was electrocuted. The Court, in holding that the Employers' Liability Act applied to the case, stated in part as follows:

> " * * * The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they were employees of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life: *Blair v. Western Cedar Co.,* 75 Or. 281 (146 Pac. 480)."

In the case of *Turnidge v. Thompson,* 89 Or. 637 (1918), an action for wrongful death was brought by a widow under the Employers' Liability Act against defendant, who owned an electric plant and transmission line. A line to a farm line from the main line on the county road crossed certain private premises. The decedent lived nearby and was killed walking across these private premises when he came in contact with the line, which had been permitted to sag almost to the ground. It was held by the Court that the Employers' Liability Act did not apply in this particular case. In its opinion the Court stated in part as follows:

> " * * * Nowhere does the statute state in direct or express terms that a member of the public, who is not also an employee or a person engaged in work on or about a machine, structure or the place specified by the act, shall have a right of action for damages. The Employers' Liability Act does not expressly confer upon the public or upon any person as a mere member of the public the right to sue for damages whenever injured. If a person who is simply a member of the public can claim the protection of the Employers' Liability Act and sue an owner of a transmission line carrying electricity, he has such a right only because of the inferences and implications to be drawn and derived from the use

of the word 'public' in the three particulars already mentioned. The avowed purpose of the statute was to protect working men and working women; and since the statute is remedial it should be liberally construed so as to accomplish its express purpose." Pp. 642-649.

"The title informs us that the bill provides for the protection and safety of persons 'engaged in' certain work and that the purpose is to extend the liability of employers to their employees; but the title does not contain the remotest intimation that the body of the bill makes the owner liable in damages to a member of the public who is neither 'engaged in' any kind of work mentioned in the title nor an employee of certain persons. * * * When measured by its title, the Employers' Liability Act is broad enough, so far as it concerns an electric wire, to include both employees of the owner of the wire and also persons 'engaged in' certain work, as exemplified in *Clayton v. Enterprise Electric Co.,* supra, but it does not go further and give a right of action to every member of the public * * * ." P. 653.

In *Rorvik v. North Pacific Lumber Co.,* 99 Or. 58 (1920), the plaintiff was the widow of the captain of a steamship, and brought an action under the Employers' Liability Act against the defendant company which operated a dock. The decedent was in charge of the ship which was being loaded at the defendant's dock when he was thrown off the dock and killed, allegedly as the result of the defendant's negligence. It was contended, among other things, by the defendant, that the Employers' Liability Act did not apply in this case, but it was held by the Oregon Supreme Court that it did. In so holding, the Court reviewed the case of *Turnidge v. Thompson* and approved the opinion in that case, stating:

> "From the lucid interpretation in that case and in other cases hereinafter mentioned, we deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such, but that it does extend its protection to employees of the particular person owning or operating dangerous machinery or engaged in hazardous employment, *and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery,* or expose themselves to the hazards of the machinery or appliances in use by the owner thereof." P. 70. (Emphasis supplied)

The Court's attention is also called to the fact that the deceased captain, had he been proceeding against his own employer, and had he been the supervisory employee in charge of the work, would not have been eligible to protection under the Employers' Liability Act under *Marks v. Bauers,* 3 Fed. (2d) 516, and *Schmidt v. Multnomah Operating Co.,* 155 Or. 53, but here he was not in charge of the work nor was the work that caused his fatal injury being carried on under his direction and control.

In *Coomer v. Supple Investment Co.,* 128 Or. 224 (1929), plaintiff brought an action under the Employers' Liability Act for injuries sustained while moving cement on a runway and using a hoist of defendant at defendant's dock and warehouse. Plaintiff worked for a building materials company which was a customer of the defendant. The Supreme Court, in upholding a judgment for plaintiff, stated in part as follows:

> "The law requires an employer to exercise every reasonable care and precaution requisite to protect its employees *and others having a duty or a legal*

> *right to be on the premises* of the employer from injury." P. 227. (Emphasis supplied)

Drefs v. Holman Transfer Co., 130 Or. 452 (1929), involved the death of the plaintiff's son while he was making an excavation in the streets of Portland while employed by the Pacific Telephone and Telegraph Company. He was killed allegedly as the result of the negligence of drivers of the defendant transfer company and the defendant ambulance company. The action was brought under the Employers' Liability Act and it was claimed that the decedent was engaged in hazardous work at the time of his death. No negligence was charged against the employer. It was held that the action was not within the Employers' Liability Act, for the reason that the Act did not extend to a case where the person charged with doing the injury had no relation by contract or otherwise with the injured workman different from that which he had with the public as a whole. In reaching this conclusion, the Court stated:

> *"In order that an employee may recover under the Employers' Liability Act, the orbit or scope of his employment must require him to be about the machinery or work of the owner in the accomplishment of a common purpose in which the owner has an interest."* P. 454-455. (Emphasis as set forth in the opinion of the Court)

The Court later in its opinion quoted the language from the decision in *Rorvik v. North Pacific Lumber Co.,* which is quoted above herein, and then stated:

> *"This decision we have followed ever since and we do not think that it extends to any case where the person charged with doing an injury sustains*

no such relation by contract or otherwise different from that which he sustains to the whole public." (Emphasis supplied)

"If the Employers' Liability Act applies to this case it applies to every case where an employee of a corporation, while in the prosecution of his business, is run into and injured by a truck owned by another corporation. Such is not the intent of the law, and such an application of it would speedily lead to its repeal. *The Employers' Liability Act is especially designed to protect workers in hazardous employment from the negligence of their employers, or those having some relation to the work or place of work or means required to prosecute the work in which they are engaged,* and not as a substitute generally for injuries for which other statutes or the common law afford redress." (Emphasis supplied) P. 459-460.

In all of these cases above quoted, the Court makes it clear that in a proper case the protection of the Employers' Liability Act can be invoked by a person who is engaged in work on the premises of a defendant owner in furtherance of a common enterprise or because of some contractual relationship between him and the owner, even though he may not be actually an employee of the owner or of anyone else.

In *Rorvik v. North Pacific Lumber Co.,* the decedent was in fact a supervisor or a person who, within the meaning of Section 102-1602 of the Act, was an agent of the steamship company, and was at the time of his fatal injury partially in charge of the work being carried on. He was not an ordinary workman within the usual meaning of the Employers' Liability Act.

In *Saylor v. Enterprise Electric Company,* 106 Or. 421, it is stated by the Court that only a person who is an employee of someone is entitled to the full protection of the Employers' Liability Act. However, that language was not necessary to the decision in that case. The decedent in that case was electrocuted when he was engaged in moving a hay derrick through a gateway on a county road, and the derrick came in contact with the transmission line of the defendant which was along the road. The decedent was not engaged in any work or activity in connection with the transmission line by virtue of any contract or other relationship with the defendant and was not engaged in anything which was in any way in the interest of the defendant.

Likewise, in the case of *Helzer v. Wax,* 127 Or. 427 (1928), it was held that plaintiff, who was engaged in the business of hauling garbage and was injured when removing some rubbish from the premises of the defendant, was not entitled to the protection of the Employers' Liability Act. The Court found that in that case the plaintiff's status was that of a business invitee or independent contractor and the case was remanded for retrial. The facts in that case are very different from those in the present case. The decedent in the present case was not only required to be on the premises of the defendant pursuant to the arrangements between W. R. Francis and the defendant for the delivery of the logs, but he was actually required to engage in work and activity in connection with the unloading of the logs. The work of the defendant's employees and the activity of the decendent while hauling for W. R. Francis were in-

termingled, as was the work of the steamship company employees and the lumber company employees in the *Rorvik* case.

The *Saylor* case and the *Helzer* case were decided before the case of *Coomer v. Supple Investment Co.* and the *Drefs* case, which are quoted above, and which clearly indicate that the protection of the Employers' Liability Act may, under proper circumstances, extend to persons who are not, strictly speaking, employees.

(4) The decedent in the present case was actually a workman engaged in the performance of personal services, and was the type of person that the Employers' Liability Act was intended to protect.

As stated in the case of *Turnidge v. Thompson*:

> "The avowed purpose of the statute was to protect working men and working women; and since the statute is remedial it should be liberally construed so as to accomplish its express purpose."

The appellant attempted in the court below, by way of oral argument and not by way of testimony, to label decedent an independent contractor. Now an independent contractor is one who knows no master; he is one who has the sole direction and control of the work he is doing. He gives orders, does not take them. The independent contractor is one "who, exercising an independent employment contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work; one who contracts to perform the work at his own risk and cost, the workmen being his servants, and

he being liable for their misconduct." *Ballentine Law Dictionary,* p. 632 (Workman's Compensation Text, Schneider, Vol. 4, p. 13).

Thus, it will be seen that when the person having the direction and control of the work involving risk and danger is the alleged employee he is ruled an independent contractor and the purported employer is not responsible under the Employers' Liability Act. The independent contractor by fact and definition being the person in direction and control of the work is responsible and he alone. Thus, we find in *Lawton v. Morgan Fliedner & Boyce,* 66 Or. 212, the words "the subcontractor was the person that had the direction and control of Lawton's work. The corporation was not exercising any supervisory care or direction over the premises of the accident, therefore the corporation was not accountable for the injury."

In 114 Or. 451, *Warner v. Synnes,* in determining whether the contractor or owner was responsible, we find the words:

> "The reason for making the contractor alone responsible and exonerating the owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of. Where the contractor controls the details of the work, he alone is responsible for an injury to an employee under this Act."

When it is determined that the unloading work was done under the sole direction and control of the appellant Johnson, the question of whether or not the Act applies is settled. The log dump foreman testified with-

out contradiction that he was in charge of the crew in regards to telling the men what time of day to come to work and planning the work to be done and how they were to take care of the logs (T. 112). He stated he was the person who determined which of the three brow logs was to be used (T. 121). The Company posted a set of work rules that all truck drivers and workmen were bound to follow and which were enforced by the boom foreman (T. 262). The engineer had the duty to see that all workmen were in the clear before he dumped his logs in the water (T. 138, 152). The unloading equipment, including the dock, brow log and unloading crane were all owned by appellant Johnson (T. 155). The evidence was uncontradicted that the decedent had no right, power or authority to direct anyone connected with the unloading operation. He could not give orders to the unloading engineer, boom foreman or scaler (T. 285, 286). In fact, the facts showed without contradiction that appellant C. D. Johnson was the sole person having the direction and control of the unloading work. Where there was no question of fact, it then became the duty of the Court to determine, as a matter of law, whether the Employers' Liability Act applied. *Hoag v. Washington-Oregon Corp.,* 75 Or. 588; *Schulte v. Pacific Paper Co.,* 67 Or. 334. The evidence showed that the deceased workman was lawfully on the appellant's property and required to work and expose himself to the hazards of the machinery and appliances of the appellant C. D. Johnson Lumber Corporation, and that the orbit or scope of his employment required that he be about appellant's machinery in the accomplishment of a com-

mon purpose in which the appellant Johnson had an interest; in fact, decedent's contract of employment required that he be exposed to the hazards and danger of appellant's machinery (T. 172). The Act contemplates that in such situations the appellant Johnson owed the deceased a duty to use every device, care and precaution that was practicable to use to protect him; this appellant failed to do. Appellee's decedent was no different from any other truck driver delivering logs to the landing and was entitled to the same protection that appellant owed all workmen at that unloading dock. Decedent's duties were the same as those of 20 other different truck drivers bringing 80 loads of logs daily to be unloaded. If the truck driver were to be the man in control, it would mean that there would be 80 different bosses throughout the day, which would produce a ridiculous and intolerable situation that would effectively prevent any work from being done.

The Court properly instructed the jury that to come under the Employers' Liability Act it first had to find that the work involved a risk or danger. *Williams, et al. v. Clemen's Forest Products,* 188 Or. 572 (1950) (T. 297). Then the Court fully submitted the question of direction and control as to Dean Hutchens, which would of necessity include any independent contractor problem that might be pertinent to this case, as follows (T. 306):

> "Of course, if you find that Dean Hutchens made his own working conditions and that the accident and injury resulted from such working conditions which he himself made, then the defendant

is not responsible for such accident or injury and your verdict would be for the defendant * * * ."

Regardless of what may be said with respect to the legal relationship between W. R. Francis and the decedent, whether he was an independent contractor or an employee, it is clear that while engaged in work on the unloading dock, he was subjected to all the hazards of the unloading operation as any other working men would have been. He was required to be there and expose himself to the hazards of the work as a result of a contractual arrangement. The work which he did and the dangers incident thereto were no different in his case than in the case of other drivers working by the hour and driving someone else's truck. The duty imposed upon the appellant, C. D. Johnson Lumber Corporation, should be the same in either case.

Respectfully submitted, this 16th day of August, 1951.

HARRY GEORGE, JR.,
EMERSON U. SIMS,
WILLIAM A. BABCOCK.